

ONTARIO BOARD OF INQUIRY DECISION

UNDER

The Ontario Human Rights Code,
R.S.O. 1981, c. 53, as amended.

PHIL GRANT

Complainant

v.

BOB WILLCOCK

Respondent

Date: July 17, 1990

Place: Toronto, Ontario

Before: Professor Errol P. Mendes

Appearances: Kaye Joachim, Counsel for the Commission

1. Waiver

At the beginning of the hearing, the respondent waived his right to be represented by counsel. The complainant stated he was satisfied to accept the presentation of counsel for the commission as his own.

2. Issue

The basic issue in this case is whether the respondent discriminated against the complainant, infringing his right to contract on equal terms without discrimination on the basis of race, colour and ancestry under section 3 of the Ontario Human Rights Code.

3. Narrative

Mr Grant is a self-employed accountant of 17 years standing. He lives in Richmond Hill Ontario. He has three children, two boys aged 15 and 12, and a girl aged 9. His spouse to whom he has been married for 16 years is Catherine Grant. Mr. Grant is black. Mrs Grant is white.

In 1986, the Grant family were vacationing in the Orillia area. They had rented a cottage there as they had done for the previous two or three years. While on their vacation, they looked for a cottage in that area to purchase. One day during this vacation, Mrs Grant came home to their rented cottage with an advertisement for the sale of a cottage in a place called Scarlet Park, a little community outside Orillia. It seemed suitable to the Grants, so Mrs Grant and her sister Audrey Lambe went to see the place in the latter part of August, 1986.

Mr. Willcock showed them through the place and explained that about the beachfront and recreational area. He seemed interested enough in Mrs. Grant as a prospective purchaser to enquire if she had children. Upon learning she has three children, he explained there were activities for the kids and that it was a great place. He then stated that he was flexible on the asking price of close to \$39,000, and that everything was included in the purchase price. He just wanted to take his personal belongings. Mrs. Grant and her sister were there for approximately 45 minutes. Mrs Grant stated she was very interested in purchasing the property and wanted to bring her husband to look at the cottage. She testified that Mr. Willcock overall during this first encounter appeared very friendly, even mentioning his own interest in the game of golf. He made no mention of any other person who was interested in buying the cottage at this encounter.

Mr. Grant returned to the cottage with his spouse and three children a couple of hours later. When they pulled up, Mr. Grant was on the verandah of the cottage. Mrs Grant testified that this time he did not seem so friendly, he seemed reserved. He did not show Mr. Grant around. Rather he indicated that as Mrs. Grant had been through the cottage, she could show her husband through. Mr. Grant and his children liked the cottage. Mr Grant immediately informed Mr. Willcock that he very interested in putting in an offer and asked how flexible the price was and if a list could be drawn up of all the items that would come with the cottage. Mr. Grant testified that he was even thinking of putting in an offer in the region of \$37,000 or 38,000.

It was at this point that Mr. Willcock first informed the Grants that he had a brother who was interested in buying the cottage, and that he would inform the Grants the next day if he could sell them the cottage.

Mr. Grant made repeated phone calls (approximately five according to Mrs. Grant's testimony) over the next two days to Mr. Willcock. Each time Mr. Willcock asked him to call back again as he had not heard from his brother. Mr. Grant testified that by now he had the impression that the respondent had little interest in selling the cottage to him.

Their suspicions raised, the Grants decided to ask Mrs Grant's mother Mrs. Violet House to find out if the cottage was still for sale. The latter phoned, found the cottage was indeed for sale and made an appointment to see the cottage. The Grants testified their main purpose in this endeavour was to ascertain why the respondent was not letting them put in an offer on the cottage.

Mrs. House did go to see the cottage, pretending she wanted to buy it. Mr. Willcock indicated that the cottage was still for sale and showed her around the place, explaining a few things about it. Mrs. House then expressed surprise that such a nice cottage had not sold already. Mrs. House testified that Mr. Willcock replied that he thought he had "sold" the place to a lady from Toronto, but she wanted to bring her husband to see it before she made a final decision. He recounted according to Mrs. House's testimony how when Mr. Grant arrived, he observed he was a negro and that "...He was as black as the ace of spades, and that they had three children that he would describe as salt and pepper." Mrs. House further testified that she asked the respondent if that was a reason not to sell the cottage. He replied in the affirmative that "...He could not sell to a black person. He said there was a committee there and that they would not accept it." Mrs. House also testified that the respondent said he had not contacted this local committee as he would not sell to Mr. Grant anyway. At no time did the respondent tell Mrs. House that his brother was actually considering buying the house. He told her he had said that to the Grants as an excuse

for not selling them the cottage.

Mr. Willcock testified that he could not imagine himself saying these things and that he did not think that way. In cross-examination by counsel for the Commission, the respondent again stated he did not recall making these statements and that he had "no feeling whatsoever about Mr. Grant being black".

The whole meeting between Mrs. House and Mr. Willcock lasted about 15 minutes, but Mrs. House claimed she remembered it accurately because she was so troubled about having to tell her daughter the reason why the respondent should not sell the cottage. Indeed she consulted with her other daughter, Audrey, because she knew her daughter and her husband would be devastated.

Mrs. House did tell her daughter and her husband what Mr. Willcock had said. The Grants testified their reaction was one of great hurt and shame. The latter emotion was particularly operative when the children had to be told why they could not purchase the property, Mr. Grant testified. Within three days of their return to Toronto on September 3, 1986, Mr. Grant contacted the Ontario Human Rights Commission and later filed a complaint.

Approximately two years later Mr. Grant purchased another cottage in the same area in Orillia. It had taken him two years to find another suitable cottage.

The eventual purchaser of Mr. Willcock's cottage was a Mrs. Elizabeth Butler, a friend of his who he had known for approximately 22 years. The sale took place in early October, 1986. It took just a day between the time Mrs. Butler's husband first phoned the respondent after learning the cottage was still for sale from a mutual friend to the time the agreement for sale was reached. The purchase price was \$36,000. Mrs. Willcock testified that the respondent had not told her his brother was interested in purchasing the property. Mr. Willcock testified that it was after his brother had indicated he did not want to buy the cottage, that he sold it to Mrs. Butler.

Mr. Grant testified that he was not seeking compensation for economic losses if the discrimination charge was proved. Rather he was seeking an outcome which showed that there was recourse in law against the infliction of such hurt upon himself and his family. He stated that no amount of money could compensate for the hurt his family had suffered. Indeed he stated if monetary compensation was offered, he would give it to an institution.

4. Conclusions of fact.

The respondent did not present any of his own witnesses or cross-examine those presented by counsel for the Commission. He did not say very much in his own defence, other than when he was cross-examined by Ms. Joachim. His only real defence was the comments described above, in particular that he could not imagine or recall that he could be the author of such clearly indefensible statements which show a clear intent to discriminate

on the grounds of race and colour. Ms. Joachim pointed out to the Board that at no time did the respondent ever clearly state that he did not make those statements. He did however accept that Mrs. House had indeed come to the cottage, with a view to purchasing it.

An assessment of the credibility of Mrs. House's testimony versus what little testimony the Board received from Mr. Willcock is central to the decision of this Board. In cases such as this, the courts have set out standards for the assessment of witness credibility. In *Faryna v. Chorny* [1952] 2 D.L.R. 354 (B.C.C.A.), at pp. 356-357, the court stated that "Opportunities for knowledge, powers of observation, judgement and memory, ability to describe clearly what he has seen and heard, as well as other factors combine to produce what is credibility,.....In short, the real test of the truth of the story of a witness must be its harmony with the preponderance of the probabilities, which a practical and informed person would readily recognize as reasonable in that place and in those conditions." This passage is very often cited in human rights cases as a basis for assessing witness credibility (see for example, *Forsyth v. Matsqui Police Service and Corporation of the District of Matsqui*, (1988) 10 C.H.R.R. D/5854 at 5859; *Humble v. K. Parsad & Co.* (1988), (C.H.R.R. D/5057 at D/5060 (B.C.H.R.C.); *Penner v. Grabriele* (1987) 8 C.H.R.R. D/4126 at D/4128 (B.C.H.R.C.); *Lindahl v. Auld-Phillips Ltd.* (1986) 7 C.H.R.R. D//3396 at D/3398; *Langevin v. Engineered Air-Air-Tex Industry Ltd.* (1984), 6 C.H.R.R. D/2552 (B.C.H.R.C.)).

With these standards in mind, I want to make the following observations:

Not many mothers would deliberately cause their daughters pain. What Mrs. House had to tell her daughter concerning her conversation with the respondent did not only deeply hurt her daughter, but also her son-in-law and her own grandchildren.

Why would she do that? For the mere possibility of some redress, not merited before a Board of Inquiry, four years later? Why would Mrs. House even take the trouble to see a cottage under false pretenses, that her daughter could not buy. The respondent did not deny she had come to see the cottage. A well founded suspicion that they had been deeply wronged, drove the people around Mr. Grant to seek the opportunities for knowledge, heightened their powers of observation, memory and ability to describe clearly what was seen and heard.

On the other hand, we have Mr. Willcock, who simply does not recall his conversation with Mrs. House, or who can not imagine himself so blatantly discriminating against a potential purchaser, simply because he was black. Yet Mr. Willcock seems to have a clear memory as to when his brother was interested in buying the cottage and when he was not. His brother was very interested when Mr. Grant were interested in purchasing the property. But when he sold the cottage to Mrs. Butler within a day, his brother was no longer interested. So why did he not mention his brother's interest either when Mrs. Grant first

appeared, and expressed an extreme interest in the cottage, or when Mrs. House came along. The answer is that his brother only became interested, when a potential purchaser who was black appeared. It was a total fabrication, as the respondent admitted to Mrs. House.

Both on the direct evidence available in this case, such as the testimony of Mrs. House and on inference from the circumstantial evidence presented, the strongest case has been made out that Mr. Willcock refused to deal with the Grants and enter into an agreement for the sale of the cottage. for the sole reason that Mr. Grant was black. In cases of alleged discrimination such as this it not unusual for the respondents not to acknowledge their discriminatory behavior to a potential witness, making direct evidence, such as that of Mrs. House's unavailable. The more unacceptable society deems discriminatory conduct to be, the more covert and less overt will be the operations of those who will persist in discriminating. The law of evidence must adapt to these changing forms of discrimination. Human rights cases have made it clear that inferences from circumstantial evidence can be made in such circumstances, (see for example, Van Acken v. Canadian Pacific Forest Products, (1990) 11 C.H.R.R. D/136 at D/139.).

5. The Law.

Someone like the respondent may feel that he has done no wrong in refusing to sell his property to another person on the basis of that person's race, colour or ancestry. He may feel that because we live in a free and democratic society, he must have the liberty to sell his private property to whosoever he feels like selling to. Indeed he may even feel that his right to do so, is protected by the right to liberty protected by the Canadian Charter of Rights and Freedoms (see section 7).

Liberty is indeed the cornerstone of our society. But if we do not wish to undermine it, we should put it in its proper perspective in any conflict, before we attempt to use it to protect a host of evils. Let us put it in its proper perspective in this particular conflict.

The respondent chose to advertise the sale of his cottage in the public domain. His advertisement in the laundromat, which Mrs. Grant saw ran as follows:

FOR SALE

3 BEDROOM WINTERIZED COTTAGE

FIREPLACE -ELECTRIC HEAT.

DOUBLE LOT. IN SCARLETT PARK

SOUTH TO LAKE COUCHAGING

BOB WILLCOCK 689-5331

When Mr. Willcock did this, he also accepted to abide by the fundamental values and laws of the public society in which he lives. Part of the fundamental values and laws of this society is the norm contained in section 3 of the Ontario Human Rights Code which states:

Every person having legal capacity, has the right to contract on equal terms without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, marital status, family status or handicap.

In our multiracial, multicultural and egalitarian society, this must be a fundamental norm of our society. If people could pretend to the world as the respondent did, that they are ready to deal with everyone on equal terms, but then proceed to "sandbag" and discriminate against those who come forward to deal with him on the basis of one of the personal characteristics mentioned in section 3 of the Ontario Human Rights Code, it would make a mockery of the fundamental norm in our society that all are entitled to equality before and under the law.

To have a liberty to discriminate on one of the prohibited grounds mentioned in section 3 in the disposal of one's private property, would also amount to the liberty to impose wanton psychological hurt and other types of damage on others, on the basis of one of the characteristics mentioned in section 3. Our society has deemed this unacceptable, and none of the relationships exempted from the operation of section 3 is relevant here.

I am in agreement with Ms. Judith Keene (see Human Rights in Ontario, Carswell, 1983 at p.26) when she asserts that "the right to contract on equal terms may also be infringed in the making of an offer and the acceptance or rejection of an offer, if any of the steps in the contract process are influenced by discrimination on a prohibited ground."

In this case, the conduct of the respondent prevented Mr. Grant from even making the offer. In such a situation, I would suggest extend Ms. Keene's statement of the ambit of section 3, to include the invitation to treat or deal stage of the contractual process, which in many, if not most instances is begun by an advertisement in a public place or in the newsmedia. Not to extend the reach of section 3 to the invitation to treat stage, would render the section ineffective in many instances. The ugly face of discrimination often makes a first appearance, when an advertisement is answered by a person who will be the target of discrimination prohibited by section 3.

6. Conclusion on the Complaint.

On the basis of the conclusions of fact and law recorded above as to the events of August, 1986, I conclude that the respondent Mr. Robert Willcock infringed the right of the complainant Mr. Phil Grant to contract under equal terms under section 3 of the Ontario Human Rights Code by discriminating against him on the basis of race, ancestry and colour, and thereby contravened section 8 of the same Code.

7. Remedies

1. Specific Compliance.

Under section 40(1)(a), of the Code, a Board has the authority to make an order to achieve compliance with the act. The Commission did not ask for any order with respect to the sale of the specific cottage, as the cottage has already been sold to an innocent third party, and it is four years after the event. The Board agrees, but wishes to point out that even though this could be the best remedy in cases such as this, it will almost never be available due to the slow-moving nature of the human rights process in Ontario. It is something that the law-reformers should pay attention to.

2. Damages.

Under section 40(1)(b), the Board has the authority to direct a party to make restitution, including monetary compensation for loss arising out of the infringement of the Code, and where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding \$10,000 for mental anguish.

Human Rights caselaw, (see for example, *Cindy Cameron v. Nel-Gor Castle Nursing Home* and *Merlene Nelson* (1981) 5 C.H.R.R. D/2170 at D/2196.) asserts that there is a presumption in favour of making an award of special and general damages, where the objective is restitution, that is the eradication of the harmful effects of a respondent's action on the Complainant.

The Commission is not seeking special damages for economic losses that the complainant may have suffered, such as the difference in the price of Mr. Willcock's cottage and the one the complainant eventually bought. Too many years have passed to make an assessment on that basis. The Commission is also not seeking punitive damages based on wilful or reckless infringement of the Code.

Mr. Grant and the Commission clearly indicated that what they were really seeking was compensation for injury to dignity, self-respect and for the loss of the right to freedom from discrimination. Human Rights cases have allowed for awards based

on these injuries, (see the Cindy Cameron case, supra at D/2198). Awards based on these types of injuries recognise that the very right to be free from unlawful discrimination has an intrinsic value.

I find this concept of a right's intrinsic value to be of great significance. It amounts to the Aristotelian concept that respect for rights creates a balance in our society. Infringement of such rights creates an imbalance which needs rectifying on behalf of the whole society and on behalf of the individual who suffers specific injuries from the infringement.

Assessing the amount to be awarded for such injuries, Human Rights Caselaw (see *Morgoch v. City of Ottawa*, (1990) 11 C.H.R.R. D/80 at D/91; *Booker v. Floriri Village Investments Inc.*, (1990) 11 C.H.R.R. D/44 at D/52) asserts that the seriousness of the effect of the discrimination upon the Complainant and the seriousness of the rights infringement should be taken into account. Awards should not be so minimal as to amount merely to a license fee to discriminate, nor should they be punitive, unless punitive damages are called for because of wilful or reckless infringement of the Code. Awards for the type of injuries asserted in this case have ranged in the past from \$1,000 to \$6,500 depending on the particular facts of the case.

Applying such standards to this case, I am particularly sensitive to the multiple facets of the injury that Mr. Grant suffered to his dignity and self-respect. He suffered it himself. He had to in effect resuffer it, in explaining to his children why he could not purchase the cottage. He had to suffer it in another fashion, through the distress of his spouse and his mother-in-law. The injury was deep enough to keep this man searching for the restitution of the balance of rights over four years and even show his lack of pecuniary interest, by asserting that he would hand over any award made to an institution.

In such a situation, I have no hesitation in assessing general damages at \$3,000 inclusive of interest, as requested by the Commission. I note that this is just under 10% of the final purchase price of Mr. Willcock's cottage. In cases such as this, this may be an appropriate yardstick which is neither punitive nor is it a mere licence fee to discriminate. In making this award, I am also mindful of the intrinsic value of the right to be free from unlawful discrimination.

8. ORDER

This Board of Inquiry, for the reasons given, orders as follows:

The respondent must pay forthwith to the complainant general damages in the amount of \$3,000, inclusive of interest.

Dated at London, Ontario, this 5th day of August, 1990.

A handwritten signature in black ink, appearing to read 'Errol P. Mendes', with a long horizontal flourish extending to the right.

Errol P. Mendes

Chair, Board of Inquiry